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No. 82-1772

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

FREEMAN H. RINGER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

MALCOLM J. HARKINS, III
Casson, Calligaro & Mutryn
9808 Wilshire Boulevard
Suite 304
Beverly Hills, California 90212
(213) 858-5981

JOSEPH L. BIANCULLI
Casson, Calligaro & Mutryn
900 Watergate Office Building
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 462-3200
Counsel for Respondent

REX L. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Petitioner

PETITION FOR WRIT OF CERTIORARI FILED APRIL 29, 1983
CERTIORARI GRANTED JUNE 27, 1983

TABLE OF CONTENTS*

	Page
1. District Court Docket Entries	1
2. Court of Appeals Docket Entries	4
3. Amended Complaint	9
4. Stipulation of June 20, 1983	29
5. Order granting certiorari	34

*The opinions of the court of appeals and the district court appear in the appendix to the petition for a writ of certiorari and have not been reproduced.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV80-4132 MRP

FREEMAN H. RINGER

v.

PATRICIA ROBERTS HARRIS, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

RELEVANT DOCKET ENTRIES

9-18-80	1. Fld complt, Issd sms Case may be ref to Mag Geffen LODGED prop ord
	2 Fld pltfs notc of mtn to certify class rtnbl 10-06-80, 9:30AM
	3 Fld pltfs motn to certify class
	4 Fld pltfs memo in supp of pltfs mtn to certify class
	5 Fld pltfs notc of mtn for prelim inj rtnbl 10-06-80, 9:30AM LODGED prop ord
	6 Fld pltfs memo in supp of pltfs mtn for prelim inj
	7 Fld pltfs mtn for waiver of inj bond
9-19-80	8 Fld pltfs applic & ORD allowng Malcolm J. Harkins, III to appear as non-res atty desig Manfred Rosenfeld
	9 Fld pltfs applic & ORD allowng Joseph L. Bianculli to appear as non-residnt desig Manfred Rosenfeld
	10 Fld pltfs applic & ORD allowng Barry S. Landsberg to appear as non-residnt atty desig Manfred Rosenfeld
10-03-80	11. Fld Stip & ORD to cont hrg date to 10-27-80 at 9:30 am, deft said mots by 10-16-80 & pltfs shl reply to such resp by 10-23-80
10-16-80	12. Fld opp to pltfs mot for prelim injunc
10-17-80	13. Fld defts notc of mot & mot to dism-rtbnl 11-10-80 at (;30am [*sic*]
10-21-80	14. Fld defts supple memo in opp to pltfs mot for prelim injunc

15. Fld defts non opp to mot for class certification

10-24-80 16. Fld pltfs memo in reply to defts opp to pltfs mot for prelim & in suppt of pltfs mot to strk

10-27-80 17. MIN ORD: exhbts mkd & admt, crt grnts pltf lv to file his mot to the complnt & notc said mot for 11-24-80, csnl for defts to tk two crt ords defts mot to dism now set for 11-20-80 cont to 11-24-80 mot for prelim injunc & mot to cert class cont to 11-24-80 at 9:30 cnsl to file a stip for the schedule for filing fur papers, all p to be fld on or bf 11-20-80, cnsl to call clk for a date & ti for w/o filing any fur papers

11-07-80 18. Fld pltfs mot to strke affrm defenses

19. Fld pltfs memo in reply to defts opp to pltfs mot for prelim & in opp to defts mot to dism & in suppt of pltfs mot to strk

20. Fld pltfs notc of appearance

21. Fld pltfs notc of mot -rtnbl 11-24-80 10am

22. Fld pltfs mot to amd complnt-rntbl 11-24-80 10am LODGED-pltfs first amd verified class actn complnt-prelim inj relief sought

LODGED-pltfs ord

LODGED-pltfs ord

11-10-80 23. Fld Stip & ORD tht pltfs wil file their mot to A/C & other m & reply to defts mot to dism by 11-4-80, defts wil file any reply or resp to the pldngs by 11-13-80, all ptys wil file any fur pa by 12n00n 11-20-80, depo of B. Winter M.D. wil be conducted NLT 11-

11-13-80 24. Fld notc to cnsl tht effect 11-1-80 procs in judge Pfaelzers wil be govnd by the FRCP for the Central Dist.

25. Fld notc of cont of the defts mot to dism, prelim inj, mot to class etc to 12-8-80 at 10am

11-14-80 26. Fld defts memo in reply to pltfs memo in opp to deft mot to d & in opp to pltfs mot to srtk

27. MIN ORD: crt & cnsl discuss depo of expert, crt ords tht the d expert can be present for the tkng of defp of the pltfs ecpert, crt fur ords tht the depo wil cont in Wash, D.C. until completed

11-21-80 28. Fld Stip & ORD defts mot to dism shl be hrd on 12-15-80 at 10am & all memo fld in reply bf 12-4-80

12-04-80 29. Fld pltfs mot to compel disov

	LODGED-ord of pltf
12-08-80	30. Fld pltfs reply to defts reply to pltfs opp to defts mot to dism
12-11-80	31. Fld defts supple brief in opp to pltfs mot for a prelim inj
	32. Fld defts notc of filing of Claude Lenfant M.D.
12-12-80	33. Fld PORTION of DEPOSITION of Benjamin Winter M.D. FILED & PLACED UNDER SEAL
12-12-80	34. Fld defts notc of filing depo of Benjamin Winter M.D.
12-15-80	35. MIN ORD: crt tks defts mot to dism under subm, pltfs mot to comp discov moot & ord off cal, pltfs mot s to certify class, to amd complnt, & to strk to be reset af ruling mot to dism
12-12-80	Fld DEPOSITIONS tkn on 11-14-80 & 12-1-80 of Caludie Lenfart M.D. & Benjamin Winter M.D. on 11-14-80
2-05-81	36. Fld pltfs subst of aty Hugh Steven Wilson & Karen Leviton of Latham & Watkins
2-13-81	37. Fld defts req fr disml & ORD (MRP) dismg complt. (ENT 2/17/81) Mld cpyies to parties. MD JS-6
*2-27-81	39. Fld pltfs notc of mot fr reconsideratn of dismal retnbl 3/23/81 10 AM
	LODEGD [sic] pltf proposd ord to vacate ord of 2/12/81 & that defts mot to dism denied
	41. Fld deft opp to mot fr reconsideratn
3-19-81	42. Fld pltfs reply to opp to mot fr reconsideratn
3-23-81	43. MIN ORD: Pltfs mot fr reconsideratn of dismal tkn under subm by crt
4-15-81	44. Fld ORD(MRP) that pltfs ti to fi notc of appeal fm this crt's ORD of 2/16/81 ext to 5/15/81
	45. Fld pltfs ex parte mot to ext ti fr filing notc of appeal to 5/15/81
5-15-81	46. Fld plfts NOTC OF APPEAL to the 9th Cir. C/A fr ORD of dsml ent on 2/16/81; $70.00 Clks' fee & docket fee paid.
6-03-81	48. Fld pltfs notc of motn for injunctn pending appeal retnbl 7-6-81, 10AM LODGED prop ORD
6-11-81	49. Fld pltfs opp to motn for inj pending appeal
7-06-81	50. MIN ORD: pltf motn fr inj pending appeal under submission

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5413

FREEMAN H. RINGER, ET AL., PLAINTIFFS/APPELLANTS

v.

RICHARD S. SCHWEIKER, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

RELEVANT DOCKET ENTRIES

1981	
MAY 30	DOCKETED CAUSE AND ENTERED APPEARANCE OF COUNSEL. ers
June 3	Filed, as of May 30, aplts' motion for selection to "Appeals Without Briefs Project". (CIVATT) 5/22
June 3	Filed, as of June 1, aple's opposition to aplts' motion for selection to "Appeals Without Briefs Project" (CIVATT) 5/28
June 11	Filed aplts' reply to aple's opposition to aplt's motion for selection to "Appeals Without Briefs Project" (CIVATT) 6/10
June 25	Filed order (SNEED & POOLE) upon due consideration of aplts' motion for selection to the appeals without briefs project and aple's opposition thereto, the motion is denied.
July 1	FILED AMENDED CERT OF RECORD (rec'd 6-22-81) (6/8/81 & 6/15/81)
Aug 10	*Filed orig & 15 Aplts' opening briefs & Excerpt of Record. 8/7
Aug 31	Filed appellants' motion for injunction pending appeal, or in the alternative, for expedited hearing. 8/27 (CIVATT)
Sept 1	Filed, as of Aug. 31, aple's motion for ext of time to file brief. (CIVATT) 8/31
Sept 3	Filed order (Motions Atty) granting ext to file aple's brief to be filed on or before Oct. 7, 1981. This order is subject to reconsideration by a judge if any opposition is filed w/in ten (10) days of the entry of the order.

Sept 9	Filed aple's motion for ext of time to file opposition to aplts' motion for injunction pending appeal. (CIVATT) 9/4
Sept 11	Rec'd aple's opposition to aplts' motion for injunction pending appeal. (motion for ext of time to file pending) (CIVATT) 9/10
Sept 24	Filed order (PREGERSON & FERGUSON) aple's motion for ext of time to respond to aplts' motion for injunction pending appeal is granted, and the opposition, heretofore rec'd, is ordered filed. Aplts' motion for an injunction pending appeal is denied as aplts failed to demonstrate a sufficient likelihood of success on the merits and the requisite balance of hardships to warrant interim relief. Aplts' alternative motion for an expedited appeal is granted, and the clerk is directed to calendar this case for argument as soon as practicable after briefing is completed. MOCAL 9/21/81
Sept 24	Filed aple's opposition to aplts' motion for injunction pending appeal. (rec'd 9/11/81)
Oct 13	Fld mtn & ord(CLK) gntg appellee an ext of time to file the answering brief to: 10-14-81.
Oct 15	Filed orig & 15 aple's briefs. (10/14)
Nov 6	Filed orig & 15 aplts' reply briefs. (11/2)
Nov 17	FILED AS OF 7/1/81, CERTIFIED RECORD ON APPEAL IN FOUR VOLUMES: PLEADINGS, VOLUMES I THRU III, ONE COPY ONLY; R/T, VOLUME IV, ORIGINAL ONLY.
Nov 18	Filed, as of Nov 13, aplts' motion to supplement the record on appeal with administrative record. (CIVATT) 11/10 CALENDARED Los Angeles 8 Jan 1982
Nov 25	Filed order (Mt Atty for Ct) aplts' motion to supplement the record to include the administrative record, including the hearing transcript, in HEW Appeals Counsel case No. 126-12-3830, *In re: Ferguson*, is granted. Aplts shall promptly arrange to supplement the record. This order is subject to reconsideration by a judge if any opposition is filed within ten (10) days of the entry of this order.
Dec 28	Filed aplts' motion to supplement record. 12/23 (panel)

Dec 30	Filed appellee's application for ext of time to file response to aplts' motion to supplement record on appeal. 12/29 (panel)
1982	
Jan 7	Recvd aple's statement of non-opposition to aplts' motion to supplement record on appeal. 1/5 (not sent to panel, see Order of 1/5/82)
Jan 7	Filed as of Jan. 5, Order by Depty Clk-for the Ct.(in LA) Aplts' motion to supplement the record on appeal is granted. The Clk of the USDC for the Central Dist. of CA is requested to supplement the record on appeal with the following: (SEE CASE FILE). The Clk of DC is directed to deliver the documents to USCA, LA Div. Office on or before Jan. 7, 1982. The motion by aple for ext of time to file response to aplts' motion to supplement the record on appeal is denied.
Jan 7	FILED CERTIFIED SUPPLEMENTAL RECORD ON APPEAL IN TWO VOLUMES OF REPORTER'S TRANSCRIPTS, VOLUMES V AND VI (ORIGINAL ONLY). *RECORD NOW IN SIX VOLUMES.*
Jan 8	ARGUED AND SUBMITTED BEFORE: NELSON, REINHARDT, CJJ & EAST, DJ
FEb 8	Rec'd ltr dtd Feb 2, from counsel for aplt, re: advising court of recent developments which are pertinent and significant to the issues raised in this appeal. (panel)
FEb 8	Rec'd ltr dtd Feb 5, from counsel for Schweiker, re: additional citations. (panel)
Mar 15	R'cvd copies of additional citations (Administrative decision) from aplts' counsel. (3/8) (panel)
Mar 15	R'cvd aple's letter in response to aplts' letter of 3/8, re: administrative decision. (3/12) (panel)
April 5	Rec'd ltr dtd April 2, from counsel for aplts, re: enclosing additional dismissals, entered without hearings, of Medicare Claims for reimbursement for bilateral carotid body resection. (panel)
April 23	Rec'd as of April 19, ltr dtd Apr 13, from counsel for aplts, re: enclosing additional dismissals, entered without hearings, of Medicare Claims for reimbursement for bilateral carotid body resection. (panel)

May 3	Rec'd ltr dtd April 30, from counsel for aple, re: additional citations. (panel)
May 18	Rec'd as of May 17, ltr dtd May 10, from counsel for aplts, re: informing Court of further administrative developments pertinent to this case. (panel)
May 24	Rec'd ltr dtd May 19, from counsel for aplts, re: informing court of further administrative developments pertinent to this case. (panel)
June 7	Rec'd ltr dtd June 3, from counsel for aplts, re: advising Court of further administrative development pertinent to this case. (panel)
June 18	Rec'd ltr dtd June 15, from counsel, for aplts, re: advising Court of further administrative developments pertinent to this case. (panel)
Aug 19	ORDERED OPINION (NELSON) FILED & JUDG TO BE FILED & ENTD.-db-
Aug 19	Filed opinion-reversed & remanded.
Aug 19	FILED & ENTERED JUDGMENT.
Aug 27	Filed Motion & Order (Clk for Court) granting appellee an ext of time to Oct. 2, 1982, within which to file petition for rehearing and/or suggestion for rehearing en banc. (panel)
Sept 2	Filed aplts' bill of costs. 9/1
Oct 1	Filed Orig & 33 Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc. (Panel, active judges) 9/30
Dec 30	Filed order (*Nelson*, Reinhardt, CCJ, and East, Senior D.J.) amending opinion filed August 19, 1982, as follows:
1983	
JAN 4	Filed as of 12/30/82 Order (NELSON, REINHARDT, EAST) The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. PLS Hold Mandate (per power)
Jan. 11	Filed as of Jan. 10, aples' motion for clarification of opinion as amended; memorandum of points and

authorities in support of motion for clarification of opinion as amended. (Panel) 1/7

Jan. 12 Re'cd aple's motion for stay of mandate, or in the alternative, for recall and stay of mandate; memorandum of points and authorities thereon; (Nelson) 1/11

Feb 1 FILED ORDER (NELSON, REINHARDT, CJ & EAST, SR.DJ) AMENDING OPINION AMENDED DECEMBER 30, 1982.

MAR 18 1983 MANDATE ISSUED

May 27 RECVD SC notice of filing of petition for writ of cert on 4/29/83, SC#82-1772.

July 1 Filed certified copy of sC order of 6/27/83, granting cert. (COPIES TO PANEL)

MALCOLM J. HARKINS, III
JOSEPH L. BIANCULLI
CASSON, CALLIGARO & MUTRYN
2600 Virginia Avenue, N.W.
Suite 900
Washington, D.C. 20037
(202) 462-3200

LATHAM & WATKINS
HUGH STEVEN WILSON
KAREN R. LEVITON
555 South Flower Street
Los Angeles, California 90071
(213) 485-1234
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No.
CV-80-04132-MRP (Gx)

First Amended Verified Class Action Complaint. Preliminary Injunctive Relief Sought.

FREEMAN H. RINGER, SANFORD HOLMES, NORMAN R. WEBSTER-ZIEBER, AND JEAN VESICO, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,
AND
BENJAMIN WINTER, M.D., PLAINTIFFS,

v.

PATRICIA ROBERTS HARRIS, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, AND HUMAN SERVICES, DEFENDANT.

VERIFIED CLASS ACTION COMPLAINT FOR INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT.

INTRODUCTION

1. This action is brought to enjoin the defendant from adhering to a Medicare coverage policy which forces eligible Medicare beneficiaries to pursue individual administra-

tive appeals in order to obtain Medicare insurance benefits for the surgical procedure bilateral carotid body resection ("BCBR") when in every one of approximately 170 cases decided to date, HHS administrative law judges and the Appeals Council have ruled that BCBR is reasonable and necessary and that Medicare must pay the cost of such treatment. In addition, plaintiffs ask this Court to prevent defendant from using her policy of publicly refusing Medicare coverage for BCBR, and the prospect of lengthy appeals to contest such policy and obtain Medicare benefits, to discourage or to prevent qualified elderly and disabled Medicare beneficiaries from obtaining BCBR when medically reasonable and necessary to relieve the symptoms of asthma, emphysema and chronic bronchitis, to improve their overall physical health, restore the quality of life or prevent premature death.

JURISDICTION AND VENUE

2. This is a civil action arising under the laws of the United States, specifically the Medicare Act, 42 U.S.C. § 1395 *et seq.*, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and the First, Fourth, Fifth and Ninth Amendments to the United States Constitution. This Court has jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1361 and 42 U.S.C. § 405(g). In addition, a declaratory judgment under 28 U.S.C. § 2201 *et seq.* is sought to determine the respective rights of the parties.

3. Venue is properly laid in the United States District Court for the Central District of California by virtue of 28 U.S.C. §§ 1391(b) and (e).

PARTIES

4. Plaintiff Freeman H. Ringer, who is 68 years of age, suffers from severe, chronic obstructive airways disease, (*i.e.*, severe emphysema), cor pulmonale and right heart strain. Plaintiff Ringer is eligible for health insurance benefits under the Medicare program, including both benefits for inpatient hospital services (Part A) and for physician services (Part B). His physician, the plaintiff Benjamin Winter, M.D., has prescribed BCBR surgery but plaintiff Ringer is unable to pay the cost of the surgery and is there-

fore prevented from obtaining the surgery by defendant's irrefutable presumption that BCBR is never reasonable and necessary and therefore never covered by the Medicare Program.

5. Plaintiff Sanford Holmes, who is 66 years of age, suffers from severe chronic obstructive airways disease (emphysema). Plaintiff Norman R. Webster-Zieber, age 66, suffers from emphysema. Plaintiff Jean Vescio is 66 years old and suffers from severe emphysema, chronic bronchitis and ashthma. Plaintiffs Holmes, Webster-Zieber and Vescio are eligible for both Part A (inpatient hospitalization) and Part B (physician's services) health insurance benefits under the Medicare Program. Their physician prescribed BCBR and each plaintiff successfully underwent such surgery. Plaintiffs Holmes, Webster-Zieber and Vescio have each filed a claim with a fiscal intermediary administering the Medicare Program on defendant's behalf for hospitalization (Part A) benefits under the Medicare Act. Acting upon instructions from defendant, the fiscal intermediary has denied the Part A claims of plaintiffs Holmes and Webster-Zieber. A claim for reimbursement of physicians' fee incurred by Plaintiffs Holmes and Webster-Zieber and Vescio as a part of the cost of BCBR surgery has also been filed. The Part B claims of plaintiffs Holmes and Webster-Zieber have been denied by the carrier acting under instructions from the defendant. Plaintiffs Holmes and Webster-Zieber have requested and either are awaiting administrative hearings on their Part A claims, or have had such hearings and are awaiting a decision.

6. Plaintiff Benjamin Winter, M.D., is a physician licensed to practice medicine in the State of California and is a specialist in chest and heart surgery. In 1962 he developed the "Winter technique" of BCBR and since then has performed this operation approximately 1,000 times. Dr. Winter prescribes BCBR to alleviate the symptoms of severe, chronic obstructive pulmonary conditions, including asthma, chronic bronchitis, and emphysema. Dr. Winter has studied extensively the effects of BCBR surgery and has published numerous articles and reports on the subject in the professional journals.

7. Defendant Patricia Roberts Harris (hereinafter the "Secretary"), is the Secretary of the United States Department of Health and Human Services. The Secretary is sued herein in her official capacity. The Secretary administers the Medicare Program through the Health Care Financing Administration and various private organizations called "fiscal intermediaries" and "carriers" (hereinafter collectively referred to as the "Department").

CLASS ACTION

8. The named plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and on behalf of a class of all similarly situated beneficiaries of the Medicare Program for whom BCBR has been prescribed and who have obtained or desire to obtain such surgery for relief of chronic obstructive lung disease including: 1) those beneficiaries for whom BCBR is medically indicated, who desire to obtain such treatment but who have been prevented from obtaining BCBR by the Secretary's policy; 2) those beneficiaries who have been dissuaded or prevented from having BCBR by the Secretary's policy of refusing coverage for BCBR who have sought and been denied such benefits before undergoing BCBR surgery; and 3) those beneficiaries awaiting an administrative hearing who have had BCBR and thereafter have been denied payment initially for the hospital and physician costs of such surgery by the department pursuant to defendant's policy statement.

9. The class is so numerous that joinder of all members is impracticable. There are questions of law or fact common to the class. The claims asserted by the representative parties are typical of the claims of the class and the representative parties will fairly and adequately protect the interests of the class.

10. Defendant has acted or refused to act on grounds generally applicable to the class and the class seeks injunctive and declaratory relief with respect to the entire class.

STATUTORY AND REGULATORY BACKGROUND

11. The Medicare Act, 42 U.S.C. § 1395 *et seq.*, entitles eligible beneficiaries to payment of the costs of both inpa-

tient hospital and physician services ("Part A"). The Act also establishes a voluntary insurance program which provides benefits for other medical and health care services, including non-hospital physician services ("Part B").

12. The Medicare Act, 42 U.S.C. § 1395y(a)(1), excludes from coverage services "which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member." The regulation at 42 C.F.R. § 405.310(k) contains language similar to that found in the above statutory provision.

13. The Medicare Act, 42 U.S.C. § 1395, also provides in part as follows:

> Nothing in this title shall be construed to authorize any federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided....

14. Defendant has published documents entitled "Medicare Carriers Manual" and "Medicare Intermediary Manual." Each manual purports to contain guidelines governing the operations of the Medicare Program by the Secretary and her fiscal agents. Both manuals identify the surgical procedure bilateral carotid body resection (BCBR) for the purpose of treating patients with obstructive pulmonary diseases as a procedure not covered under Medicare.

15. The Manuals have not been promulgated as regulations, but the fiscal agents which administer the Medicare program on defendant's behalf are bound absolutely by the Manuals and, therefore, routinely deny hospital insurance benefits for BCBR surgery without considering whether the BCBR surgery was actually "reasonable or necessary" in the care and treatment of the individual claimant under the 42 U.S.C. § 1395(y)(a)(1) and 42 C.F.R. § 405.310(k).

16. After a Medicare claimant has been denied insurance benefits (Part A) for BCBR surgery by the fiscal intermediary, the claimant has the right to a hearing before an HHS Administrative Law Judge pursuant to 42 U.S.C. § 405(g) and 42 C.F.R. § 405.1530 and § 405.1533. Administrative Law Judges are not bound by the provisions of the Inter-

mediary Manual but are obliged to adjudicate appeals applying the Medicare Act and its implementing regulations. To date, Medicare beneficiaries have appealed over 200 cases in which HHS refused to cover the cost of BCBR. In every one of approximately 170 cases decided to date, HHS Administrative Law Judges have found that the BCBR surgery was reasonable and necessary treatment for the chronic obstructive airways diseases from which the claimant suffered and ordered that HHS must pay the inpatient hospital cost component of such treatment.

17. After a beneficiary is denied Part B benefits initially and upon review by defendant or her fiscal agent (*i.e.*, a "carrier") the only administrative review available for plaintiffs' Part B claims is an appeal to a hearing officer appointed and employed by the fiscal agent. Because the hearing officer is bound by the Manuals and has no authority to disregard defendant's BCBR policy and determine that a procedure was reasonable and necessary and must be covered, such an appeal offers neither an effective nor an adequate remedy. Due to the lack of effective appeal mechanisms, plaintiffs' claims for Part B reimbursement are routinely denied. Defendant has not paid Part B reimbursement even in those cases in which BCBR has been finally ruled reasonable and necessary in Part A hearings.

18. The HHS Appeals Council possesses the power to review Part A decisions of the Administrative Law Judges on its own motion, even if favorable to the beneficiary. 42 C.F.R. §405.1570. The Appeals Council on its own motion may also remove to itself any pending request for a hearing before an Administrative Law Judge. 42 C.F.R. § 405.1559.

19. Following numerous reversals of the defendants' presumptive denial of Part A benefits for BCBR surgery by the Administrative Law Judges, defendant, through the Health Care Financing Administration, requested the Appeals Council to review approximately 70 of the decisions. At a hearing held on May 1, 2, and 3, 1979, the Appeals Council heard expert medical testimony and legal arguments from all interested parties, including the Secretary.

20. In a 24-page written decision the Appeals Council concluded that "in view of the various opinions and expressions of professional judgment brought to its attention, the Appeals Council will find that the bilateral carotid body resection operations performed in these cases were reasonable and necessary." (Exhibit A).

21. In reaching the conclusion that the BCBR procedure was reasonable and necessary in the cases under review the Appeals Council found that BCBR enhanced the quality of the claimants' life and that patients undergoing BCBR did not evince a greater mortality rate than those patients under medical management.

22. Despite the decisions of the Administrative Law Judges and the decision of the Appeals Council, defendant continues to apply an irrefutable presumption that BCBR surgery is never reasonable and necessary and to deny benefits routinely under both Part A and Part B for BCBR surgery.

23. By letter dated March 6, 1980 the Secretary reissued her previous BCBR policy and announced that HHS would continue to deny benefits for BCBR and that Medicare would pay the cost of BCBR only when ordered to do so by the Administrative Law Judges and Appeals Council. Such decision is a final decision from which there is no further administrative appeal.

24. On October 16, 1980 the Administrator of the Health Care Financing Administration signed and issued for publication in the *Federal Register* a Health Care Financing Administration Ruling ("HCFA BCBR Ruling") that restates defendant's policy precluding Medicare coverage of BCBR.

25. Plaintiffs are persons aggrieved by final agency action. Plaintiffs have exhausted all available administrative remedies. No further adequate or effective avenues of administrative relief are available to plaintiffs.

IRREPARABLE INJURY

26. As a result of defendant's irrefutable presumption denying Medicare health insurance benefits for hospital and other expenses incurred in providing BCBR surgery, eligible Medicare beneficiaries such as plaintiffs Ringer,

Holmes, Webster-Zieber, Vescio, and other of Dr. Winter's patients are being denied their statutory rights to prompt payment of insurance benefits for reasonable and necessary medical treatment prescribed by their physician. Plaintiffs Ringer, Holmes, Webster-Zieber, Vescio, and the class they and Dr. Winter represent also are being compelled by defendants' actions to forego needed medical treatment against their wills and against their physicians' professional advice, thus diminishing their quality of life and risking an immediate deprivation of life itself in violation of their statutory and constitutional rights.

27. Without this Court's intervention, defendants will continue to cause irreparable injury to eligible Medicare beneficiaries who are in need of BCBR surgery but who are compelled to forego such surgery because of defendants' illegal action.

28. Without this Court's intervention the plaintiff Dr. Winter will suffer irreparable injury and interference with his practice of medicine and with his physician-patient relationships in violation of his statutory and constitutional rights.

COUNT ONE.

29. Paragraphs 1-28 are incorporated herein by reference.

30. Defendant's policy of routinely and presumptively denying the Medicare benefits, described above, is illegal, arbitrary, capricious, irrational and deprives plaintiffs of due process of law in violation of the Fifth Amendment to the United States Constitution.

COUNT TWO.

31. Paragraphs 1-30 are incorporated herein by reference.

32. Defendant's action of presumptively denying health insurance benefits to eligible Medicare beneficiaries for hospital costs incurred in providing BCBR surgery ignores and is contrary to every decision of HHS's own Administrative Law Judges and to the decision of the Appeals Council addressing the issue of Medicare coverage of BCBR sur-

gery. These decisions have found, without exception, that BCBR surgery is a reasonable and necessary treatment for obstructive pulmonary conditions.

33. By continuing to deny Medicare coverage of BCBR surgery based on a policy which has been rejected in every one of approximately 170 decisions of the Administrative Law Judges and the Appeals Council, the defendants have violated the Administrative Procedure Act, 5 U.S.C. § 706(2), and have acted arbitrarily, capriciously and beyond their statutory authority.

COUNT THREE.

34. Paragraphs 1-33 are incorporated herein by reference.

35. Notwithstanding defendant's policy denying Medicare coverage of BCBR, 100% of those beneficiaries undergoing the procedure and pursuing an administrative appeal to HHS' Bureau of Hearings and Appeals ("BHA") have been determined to be entitled to Medicare (Part A) benefits for hospitalization costs incurred to obtain BCBR.

36. Defendant's reaffirmation and adherence to its policy absolutely precluding Medicare coverage of BCBR illegally penalizes and discriminates against Medicare beneficiaries who have or desire to obtain BCBR by requiring such patients to pursue individual administrative appeals to obtain benefits to which HHS's administrative law judges and Appeals Council have consistently ruled such beneficiaries are entitled while not imposing such burden on any other group of Medicare beneficiaries receiving covered services.

37. Further, defendant's policy precluding Medicare coverage of the costs of BCBR unless payment is ordered by the Appeals Council or by an administrative law judge applies two standards of eligibility for Medicare benefits, one for beneficiaries who seek a hearing before an administrative law judge and one for beneficiaries who do not or are unable to obtain a hearing before an administrative law judge.

38. Defendant's BCBR policy and the burdens which such policy imposes on Medicare beneficiaries claiming benefits for BCBR are justified by no legitimate governmental

interest, rest upon no reasonable basis and bear no rational relation to the purposes of the Medicare Act.

39. Defendant's policy arbitrarily and illegally discriminates against Medicare beneficiaries such as plaintiffs claiming Part A or Part B benefits for BCBR or desiring to obtain such treatment, and denies plaintiffs and the members of the class they represent equal protection of the laws in violation of the Fifth Amendment to the Constitution of the United States.

COUNT FOUR.

40. Paragraphs 1-39 are incorporated herein by reference.

41. Defendant's failure to revise her policy to permit Medicare coverage of BCBR without requiring all claimants for such benefits to pursue individual appeals violates the mandate of 42 U.S.C. § 405(a) that the defendant adopt reasonable rules to establish the right to benefits under the Medicare Program and renders defendant's policy null and void.

COUNT FIVE.

42. Paragraphs 1-41 are incorporated herein by reference.

43. Defendant's denial of health insurance benefits to eligible Medicare beneficiaries for hospital costs incurred in providing BCBR surgery compels eligible Medicare beneficiaries to endure uncertain, extremely protracted and unreasonable appeals in order to receive their entitled benefits.

44. These delays and accompanying expenses are so unreasonable that they have compelled plaintiff Ringer and the class which he represents to forego needed medical treatment rather than endure such administrative delay and absorb such expenses.

45. Defendant's actions violate the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, which provides that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it . . .," 5 U.S.C. § 555(b), and brings into play

the statutory command and that the reviewing court "shall ... (1) compel agency action unlawfully withheld or unreasonably delayed ...." 5 U.S.C. § 706(1).

COUNT SIX.

46. Paragraphs 1-45 are incorporated herein by reference.

47. Defendant's action of presumptively denying health insurance benefits to eligible Medicare beneficiaries based on an irrebutable presumption that BCBR surgery is never reasonable and necessary without consideration of the individual claimant's physical condition violates the Medicare Act, 42 U.S.C. § 1395y(a)(1), and the corresponding regulation, 42 C.F.R. § 405.310(k), which require the Secretary to pay insurance benefits for hospital services which are reasonable and necessary for the treatment of illness or injury.

COUNT SEVEN.

48. Paragraphs 1-47 are incorporated herein by reference.

49. Defendant's action of presumptively denying health insurance benefits to eligible Medicare beneficiaries for hospital costs incurred in providing BCBR surgery is founded upon defendants' view that BCBR surgery is never appropriate or necessary medical treatment.

50. Denial of Medicare coverage for BCBR surgery has compelled the plaintiff Ringer and the class which he represents to forego necessary and reasonable medical treatment contrary to the advice of their physicians and has needlessly and unlawfully interjected defendants' views on the practice of medicine into the relationship between patient and physician.

51. Defendant's actions violate the Medicare Act, 42 U.S.C. § 1395, in that defendants are unlawfully "exercis[ing] ... supervision or control over the practice of medicine or the manner in which medical services are provided...."

COUNT EIGHT.

52. Paragraphs 1-51 are incorporated herein by reference.

53. Defendant's action has a chilling effect on the relationship between patient and physician by causing patients to forego prescribed medical treatment for reasons other than the patient's physical and emotional health.

54. Defendant's action also has a chilling effect on the practice of medicine and on innovation in medical practices by presumptively denying benefits for BCBR surgery solely because of defendant's view that such surgery is never appropriate or efficacious.

55. Defendant's action unconstitutionally interferes with the practice of medicine and the patient-physician relationship in violation of the First, Fourth, Fifth and Ninth Amendments to the United States Constitution.

COUNT NINE.

56. Paragraphs 1-55 are incorporated herein by reference.

57. Section 205(a) of the Social Security Act, 42 U.S.C. § 405(a), applicable to the Medicare Program by virtue of Section 1872, 42 U.S.C. § 1395ii, mandates that defendant "shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proof and evidence and the method of taking and furnishing the same ... in order to establish the rights to benefits hereunder".

58. Defendant's failure to promulgate her policy statement governing Medicare coverage of BCBR pursuant to the rulemaking requirements of the Administrative Procedure Act violates the mandate of 42 U.S.C. § 405(a) that the Secretary adopt proper rules establishing the right to benefits and renders such policy null and void.

COUNT TEN.

59. Paragraphs 1-58 are incorporated herein by reference.

60. The Department of Health and Human Services is required by law and in particular by 5 U.S.C. § 552, 5 U.S.C. § 706(2)(D) and 42 U.S.C. § 1395hh to publish proposed

rules in the Federal Register prior to their promulgation. All interested persons must be given an opportunity to participate in the rulemaking process.

61. The Department of Health and Human Services is further bound by its own Statement of Policy, issued January 28, 1971, in which the Secretary stated that "[e]ffective immediately, all agencies and offices of the Department which issues rules and regulations relating to public property, loans, grants, benefits, or contracts are directed to utilize the public participation procedures of the APA, 5 U.S.C. 553." 36 Fed. Reg. 2532 (February 5, 1971).

62. Plaintiffs Ringer, Holmes, Webster-Zieber, Vescio, Winter and the class which they represent are entitled to Medicare inpatient hospital insurance benefits for hospital services which are "reasonable and necessary for the treatment of illness or injury..." pursuant to the Medicare Act, 42 U.S.C. § 1395y(a)(1), and the corresponding regulation, 42 C.F.R. § 405.310(k).

63. The Coverage Issues Appendices to the "Medicare Carriers Manual" the "Medicare Intermediary Manual" and the HCFA BCBR Ruling which provide that BCBR surgery is never a reasonable and necessary treatment of obstructive pulmonary conditions were issued without valid, legal, or proper notice of proposed rulemaking.

64. By denying benefits for BCBR surgery, the Appendices to the Manuals described above and the HCFA BCBR Ruling substantively changed the Medicare benefits policy stated in 42 U.S.C. § 1395y(a)(1) and 42 C.F.R. § 405.310(k) which require benefits for services which are "reasonable and necessary" to treat an illness or condition.

65. These Appendices and the HCFA BCBR Ruling precluding Medicare coverage of BCBR directly, substantially and definitively control the scope and extent of Medicare benefits available to plaintiffs and to the class which they represent.

66. As a result of defendant's failure to issue the policy precluding Medicare coverage of BCBR pursuant to the rulemaking procedures specified by the Administrative Procedure Act, the requirements of 5 U.S.C. § 553(b), 5 U.S.C. § 706(2)(D) and 42 U.S.C. § 1395hh have been vio-

lated, and the exclusion from coverage of BCBR surgery contained in the Appendices is accordingly null and void and of no effect.

COUNT ELEVEN.

67. Paragraphs 1-66 are incorporated herein by reference.

68. Hearings before administrative law judges on Part A claims requested by or on behalf of Medicare beneficiaries who have received BCBR have been held before at least ten different administrative law judges in various areas of the country.

69. As a matter of both HHS policy and practice all claims for hearings regarding Medicare benefits are assigned upon request of the beneficiary or his representative to an administrative law judge sitting at a location designated by the beneficiary as convenient and accessible.

70. Upon request, plaintiff Winter acts as the representative of his BCBR patients in administrative hearings. In all cases where he is designated as the representative of a Medicare patient for purposes of representation in the administrative hearing process, plaintiff Winter has designated West Los Angeles as an acceptable and convenient site for all administrative hearings pertaining to BCBR.

71. Until approximately April, 1980, defendant, consistent with her policy and practice, honored all such requests regarding assignment of claims for BCBR coverage for administrative hearings. Hearings requested by or on behalf of Medicare beneficiaries who have received BCBR from plaintiff Winter and who reside in the Los Angeles area were uniformly assigned to and held before the same administrative law judge, Judge Edward H. Schiff.

72. Judge Schiff, like all other ALJ's reviewing claims for Medicare payment for BCBR, has ruled that such surgery is reasonable and necessary in every case which he has decided to date.

73. Sometime prior to June 18, 1980, plaintiff Winter was informed by staff personnel of the Medicare Regional Office in San Francisco that henceforward claims would not be assigned to Judge Schiff for hearings.

74. On June 18, 1980 Administrative Law Judge Stanley Sadur confirmed the information previously provided to plaintiff Winter that BCBR hearings would no longer be assigned to Judge Schiff.

75. On June 18, 1980 Judge Sadur requested time to discuss the matter with unidentified superiors at the Health Care Financing Administration's ("HCFA") offices in Washington, D.C.

76. On June 23, 1980, Judge Sadur informed plaintiff Winter that it would be necessary for Judge Schiff to be relieved of further hearings involving BCBR claims.

77. Defendant's actions in directing that no more BCBR hearings be assigned to Judge Schiff constitutes an unwarranted and unlawful intrusion upon the integrity and quasi-adjudicative and deliberative functions of the Bureau of Hearings and Appeals and denies plaintiffs due process of law in violation of Social Security Act, 42 U.S.C. § 205(a) and (b), the Administrative Procedure Act, 5 U.S.C. § 706, and the due process clause of the Fifth Amendment to the United States Constitution.

COUNT TWELVE.

78. Paragraphs 1 through 77 are incorporated herein by reference.

79. The HCFA BCBR Ruling neither adds to nor detracts from defendant's previous policy denying Medicare coverage for BCBR surgery under all circumstances or the application of that policy to individual cases, both as set out above. In particular, the policy statement merely reaffirms instructions already generally applicable to fiscal intermediaries set out in the Coverage Issues Appendices (*see* ¶¶ 14, 15 *supra*, and Defendant's letter (with attachments) attached as Exhibit B), as applied to each claim for reimbursement for expenses associated with BCBR surgery.

80. The HCFA BCBR Ruling is based on a legal and factual record already rejected in every one of approximately 170 decisions of the Administrative Law Judges and the Appeals Council, and as such is arbitrary, capricious, contrary to law and beyond defendant's statutory authority in

violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

81. The HCFA BCBR Ruling arbitrarily and illegally discriminates against Medicare beneficiaries desiring to obtain BCBR treatment and be reimbursed therefor by the Medicare Program, and accordingly denies plaintiffs and the members of the class they represent equal protection of the laws in violation of the Fifth Amendment of the United States Constitution.

82. The HCFA BCBR Ruling is illegal, arbitrary, capricious, irrational and deprives plaintiffs of due process of law in violation of the Fifth Amendment to the United States Constitution.

83. The HCFA BCBR Ruling violates the following provisions of the Medicare Act:

(a) 42 U.S.C. § 405(a), which requires defendant to adopt reasonable rules to establish the right to benefits under the Medicare Program;

(b) 42 U.S.C. § 1395y(a)(1), which requires that defendant pay insurance benefits for hospital services for the treatment of illness or injury;

(c) 42 U.S.C. § 1395, which prohibits defendant from "exercis[ing] . . . supervision or control over the practice of medicine or the manner in which medical services are provided . . ."

As a result of these violations, the HCFA BCBR Ruling is null and void.

84. The HCFA BCBR Ruling unconstitutionally interferes with the practice of medicine and the patient-physician relationship in violation of the First, Fourth, Fifth and Ninth Amendments to the United States Constitution.

COUNT THIRTEEN.

85. Paragraphs 1 through 84 are incorporated herein by reference.

86. The HCFA BCBR Ruling invades the personal liberty interests of plaintiffs and the class they represent by denying them due process of law and equal protection of the laws in violation of the Fifth Amendment to the United

States Constitution and by interfering with the practice of medicine and the patient-physician relationship in violation of the First, Fourth, Fifth and Ninth Amendments to the United States Constitution.

87. As a consequence of the foregoing deprivation of rights secured by the United States Constitution, plaintiffs have suffered material damage to their health, well being and property.

COUNT FOURTEEN.

88. Paragraphs 1 through 87 are incorporated herein by reference.

89. Defendant's promulgation of the HCFA BCBR Ruling after the filing of the Complaint in this matter is a thinly disguised effort to divest this Court of jurisdiction over this matter by attempting to erect an additional administrative barrier to be surmounted by those plaintiffs, and the class they represent, who have not yet undergone the BCBR surgery. This type of bootstrap argument is a fundamental interference with the orderly administration of due process of law in violation of the Fifth Amendment to the United States Constitution.

90. As a consequence of the foregoing deprivation of rights secured by the United States Constitution, plaintiffs have suffered material damage to their health, well being and property.

PRAYER.

WHEREFORE, plaintiffs pray that this Court:

1. Determine that this action is maintainable as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure;

2. Declare that defendant has violated the Medicare Act, 42 U.S.C. § 1395d(a)(1) and § 1395y(a)(1), by denying Medicare benefits for hospital costs incurred in providing BCBR surgery on the grounds that such surgery is "not reasonable and necessary" and enjoin defendants, preliminarily and permanently, from future violations;

3. Declare that defendant's Coverage Issues Appendices to the Medicare Carriers Manual and the Medicare Intermediary Manual and the HCFA BCBR Ruling, insofar as

those documents state that BCBR surgery is never a reasonable and necessary treatment for obstructive pulmonary conditions, are in violation of the Medicare Act, 42 U.S.C. § 1395, § 1395d(a)(1) and § 1395y(a)(1) and are therefore null and void and of no effect:

4. Declare that the Appendices and Ruling described in paragraph 3 above were issued without public notice or public participation, in violation of 5 U.S.C. § 553, 5 U.S.C. § 706 and 42 U.S.C. § 1395hh and are therefore null and void and of no effect;

5. Issue an injunction compelling defendant to amend said Coverage Issues Appendices and Ruling forthwith to provide BCBR is a reasonable and necessary treatment for obstructive pulmonary conditions;

6. Declare that defendant's actions described herein constitute an "unreasonable administrative delay" and "unreasonably withheld administrative action" in violation of the Administrative Procedure Act, 5 U.S.C. § 555(b) and § 706(1), and enjoin defendants, preliminarily and permanently, from future violations;

7. Declare that defendant's refusal to recognize BCBR surgery as a "reasonable and necessary" treatment for obstructive pulmonary conditions is arbitrary, capricious and beyond her statutory authority in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), and enjoin defendant, preliminarily and permanently, from future violations;

8. Declare that defendant's actions described herein have denied plaintiffs their statutory rights under the Medicare Act without due process of law in violation of the Fifth Amendment to the United States Constitution and enjoin defendant, preliminarily and permanently, from future violations;

9. Declare that defendant's actions described herein deprive plaintiffs of equal protection of the laws in violation of the due process clause of the Fifth Amendment and enjoin defendant, preliminarily and permanently, from future violations.

10. Declare that defendant's actions described herein constitute an unlawful interference with the plaintiff

Winter's practice of medicine and plaintiff patients' relationship with plaintiff Winter in violation of the Medicare Act, 42 U.S.C. § 1395, and enjoin the defendant, preliminarily and permanently, from future violations;

11. Declare that defendant's actions unconstitutionally and unlawfully interfere with the practice of medicine and the patient-physician relationship in violation of the First, Fourth, Fifth and Ninth Amendments and enjoin defendant, preliminarily and permanently, from future violations;

12. Declare that defendant's actions described herein threaten an imminent and irreparable deprivation of plaintiffs' lives in violation of their statutory rights and the due process clause of the Fifth Amendment and enjoin defendant, preliminarily and permanently, from future violations;

13. Declare the defendant's actions described in Count Eleven constitute an illegal and unwarranted intrusion into the quasi-adjudicative deliberative processes of the administrative law judge thereby depriving plaintiffs of statutory and constitutional rights to a fundamentally fair hearing and enjoin defendant, preliminarily and permanently, from future violations.

14. Declare that the HCFA BCBR Ruling described in Count Twelve is arbitrary, capricious, contrary to law and beyond defendant's statutory authority in violation of the Medicare Act and the Administrative Procedure Act; that it violates 42 U.S.C. §§ 405(a), 1395 and 1395y(a)(1), and that it violates plaintiffs' rights secured by the First, Fourth, Fifth and Ninth Amendments to the United States Constitution;

15. Issue an injunction prohibiting defendant from implementing or applying the policy expressed in the HCFA BCBR Ruling;

16. Award plaintiffs damages in an amount to be determined by the proofs for the violation of their rights secured by the First, Fourth, Fifth and Ninth Amendments to the United States Constitution as set forth in Counts 13 and 14;

17. Award plaintiffs costs, including reasonable attorneys' fees; and

18. Grant such further relief as the Court may deem reasonable and appropriate.

Respectfully submitted,

MALCOM J. HARKINS, III
JOSEPH L. BIANCULLI
Casson, Calligaro & Mutryn
2600 Virginia Avenue, N.W.
Suite 900
Washington, D.C. 20037
(202) 462-3200

/s/ Karen R. Leviton

Latham & Watkins
HUGH STEVEN WILSON
KAREN R. LEVITON
555 South Flower Street
Los Angeles, California 90071
(213) 485-1234

MALCOLM J. HARKINS, III
CASSON, CALLIGARO & MUTRYN
9808 Wilshire Boulevard
Suite 304
Beverly Hills, California 90212
(213) 858-5981
Attorneys for Plaintiffs

STEPHEN S. TROTT
United States Attorney

FREDERICK M. BORSIO, JR.
Assistant United States Attorney
Chief, Civil Division

HOWARD GEST
Assistant United States Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 688-5711
Attorney for Defendant.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 80-04132-MRP (Gx)

FREEMAN H. RINGER, ET AL., PLAINTIFFS

v.

MARGARET HECKLER, DEFENDANT.

STIPULATION.

During the hearing in this case on October 27, 1980 the paties entered into a Stipulation with respect to certain matters. The Stipulation was in written form, according to the transcript, and was modified by the parties through interlineation in open Court. The transcript indicates that a copy of the Stipulation was submitted to the Court for filing, but the clerk has been unable to locate the original document.

The parties have conferred and agreed, however, that the attached Stipulation, including the interlineations noted with respect to paragraph 6, represents the Stipulation agreed to by the parties and filed with the Court on October 27, 1980. Accordingly, submitted herewith for filing is a copy of the October 27, 1980 Stipulation. Filing of the Stipulation at this time is necessary because counsel for the plaintiffs has relied on the matters contained therein in the course of responding to the government's Petition for a Writ of Certiorari.

Respectfully submitted,

/s/ Malcolm J. Harkins

MALCOLM J. HARKINS, III
Casson, Calligaro & Mutryn
9808 Wilshire Boulevard
Suite 304
Beverly Hills, California 90212
(213) 858-5981

Attorneys for Plaintiffs

/s/ Howard Gest

STEPHEN S. TROTT
United States Attorney

FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

HOWARD GEST
Assistant United States Attorney

1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 688-5711

MALCOLM J. HARKINS, III
JOSEPH L. BIANCULLI
Casson, Calligaro & Mutryn
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 462-3200

MANFRED ROSENFELD
Lewitt, Hackman & Hoefflin
16633 Ventura Blvd.
Suite 1115
Encino, California 91436
(213) 990-2120

Attorneys for Plaintiffs

ANDREA SHERIDAN ORDIN
United States Attorney

FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

HOWARD GEST
Assistant United States Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 688-5711

Attorneys for Defendant.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 80-04132-MRP (Gx)

FREEMAN H. RINGER, ET AL., PLAINTIFFS,

v.

PATRICIA ROBERTS HARRIS, DEFENDANT.

STIPULATION.

The parties hereby stipulate to the following:

1. Were plaintiffs Ringer, Vescio, Webster-Zieber and Holmes to testify, each would testify to essentially the following:

(a) Each is a patient of Dr. Benjamin Winter;

(b) Each has been diagnosed as suffering from severe lung disease;

(c) Each has experienced severe breathing difficulties as a symptom of his or her illness;

(d) Dr. Winter has prescribed bilateral carotid body resection (BCBR) surgery to alleviate the symptoms of their lung diseases; and

(e) Each is a Medicare beneficiary eligible for benefits under Medicare Part A and Part B.

2. Plaintiffs Holmes, Webster-Zieber and Vescio would testify that each had prescribed and successfully underwent BCBR surgery to alleviate the symptoms of their illnesses and that they believe that the surgery did in fact alleviate those symptoms.

3. Plaintiff Ringer would testify that he has had prescribed and desires to undergo BCBR surgery but is unable to pay the costs thereof.

4. Neither Mr. Ringer nor the class members he represents have filed claims for Medicare reimbursement for BCBR surgery costs.

5. The Department of Health and Human Services has ruled that "Bilateral carotid body resection performed to relieve and treat pulmonary symptoms and diseases is not established as safe and effective and, therefore, is excluded from Medicare coverage under the authority of section 1862(a)(1) of the Act."

6. As of October 27, 1980, at least 199 appeals of denials of Medicare reimbursement for costs of BCBR surgery had been heard by HHS administrative law judges. Of these 199 appeals, the ALJs ordered reimbursement in at least 170 cases and at least 12 cases were dismissed as premature. Decisions ordering reimbursement have been rendered by at least ten different ALJs in addition to the three judges of the Appeals Council.

7. The Certified Administrative Record, including the transcript and administrative record, will be in the case

Lena Furguson, Appeals Council Dec. 126-12-3830, filed by defendant with the Court herewith, or as soon as a copy is available. If a certified copy is not available and filed with the Court on or before the hearing date, either party may file an uncertified copy of the Appeals Council Decision and the transcript and exhibits upon which such Decision was based subject to replacement with the Certified Record when available.

Respectfully submitted,

/s/ Joseph L. Bianculli

MALCOLM J. HARKINS, III
JOSEPH L. BIANCULLI
Casson, Calligaro & Mutryn
900 Watergate Office Building
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 462-3200

MANFRED ROSENFELD
Lewitt, Hackman & Hoefflin
16633 Ventura Blvd.
Suite 1115
Encino, California 91436
(213) 990-2120
Attorneys for Plaintiffs

ANDREA SHERIDAN ORDIN
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
HOWARD GEST
Assistant United States Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 688-5711

In the Supreme Court of the United States

No. 81-1772

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER,

v.

FREEMAN H. RINGER, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 27, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.